

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
KENNETH AND MARYANN GREENLAND	:	DETERMINATION
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1981 through 1983.	:	

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Petitioners, Kenneth and Maryann Greenland, 1624 N.E. 24th Street, Jensen Beach, Florida 33457, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1981 through 1983 (File No. 802927).

A hearing was held before Kevin A. Cahill, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York on September 11, 1989 at 2:45 P.M., with all briefs to be submitted by January 3, 1990. Petitioners appeared pro se. The Division of Taxation appeared by William F. Collins, Esq. (Irwin Levy, Esq., of counsel).

ISSUES

- I. Whether petitioners substantiated certain itemized deductions claimed on their 1982 and 1983 New York personal income tax returns.
- II. Whether petitioner Kenneth Greenland is required to include certain life insurance premiums paid by his employer as income for the years 1981, 1982 and 1983.
- III. Whether petitioners are required to include state income taxes paid as taxable income for the years 1981, 1982 and 1983.
- IV. Whether petitioners are entitled to a refund of personal income tax for the year 1983 notwithstanding the redetermination of the deficiency herein.

FINDINGS OF FACT

1. On October 11, 1985 the Division of Taxation issued to Kenneth and Maryann Greenland (hereinafter "petitioners") a Statement of Personal Income Tax Audit Changes which advised of the disallowance of certain claimed losses for 1982 and 1983 and the inclusion of group term life insurance paid by an employer as income for each of the years in issue. State income tax deducted for Federal purposes was added back for each of the years in issue. The statement included a recomputation of the tax due for the year 1981, resulting in an overpayment for that year in the amount of \$1,175.50. Additional tax was determined to be due in the amount of \$577.43 for the year 1982 and \$870.07 for the year 1983. The recomputation for all three years produced a net additional tax due of \$272.00 plus interest.

2. On January 15, 1986 the Division of Taxation issued a Notice of Deficiency to petitioners advising that additional tax in the amount of \$272.00 plus interest was due for the years 1981, 1982 and 1983.

3. Petitioners were residents of New Jersey. During the years in issue, petitioner Kenneth L. Greenland was employed by New York Life Insurance Company in New York City. In 1981, 1982 and 1983 respectively, Mr. Greenland received \$33,042.83, \$37,035.25 and \$38,883.23 as wages from New York Life Insurance Company. Said amounts included the premiums for company provided group term life insurance. Petitioners indicated the net amount (total compensation less the cost of group term life insurance) as wages on their New York State nonresident income tax returns for the years in issue (1981 - \$32,587.80, 1982 - \$36,375.04 and 1983 - \$38,266.64).

4. Petitioners claimed a theft loss in the amount of \$7,400.00 for 1982 and \$8,500.00 for 1983 purportedly associated with an embezzlement scheme. On their 1982 and 1983 federal returns, petitioners explained that the theft loss was computed based on "IOU's" from an individual with whom petitioners invested upon the promise of a 20 to 50 percent return on investment. After learning that the individual had been involved in other embezzlement schemes, petitioners demanded their money back but were unsuccessful.

5. Although claiming to have copies of I.O.U.s, petitioners offered no such documentation or other proof regarding amounts or circumstances in support of the claimed theft loss.

6. Petitioners claimed a casualty loss in the amount of \$5,500 for 1983 from a house fire. On their 1983 federal return petitioners explained their loss as "Fire in cellar - Almost lost house. Estimate by independent adjusters and appraisers \$5500 due to structure damage, burned out wiring, insulation, freezer, gallons of paint, tools -water- smoke, etc. If and when ins. is paid I will owe adjusters 10% of amount."

7. Petitioner Kenneth Greenland testified that his insurance company reimbursed him for an amount in excess of \$3,600.00 for the damage to his home resulting from the fire for which petitioners claimed a loss of \$5,500 on their 1983 return. He further stated that the insurance company appraisal was "\$3,600 plus the deductible." However, Mr. Greenland could not state the amount of the deductible. Except for Mr. Greenland's testimony, petitioners offered no other proof or documentation regarding the amount of the loss or of either appraisal.

8. In computing their New York itemized deductions, petitioners did not add back that amount which was carried over from their Federal returns as an itemized deduction for state income taxes. The Division of Taxation recomputed petitioner's New York income to add back state income taxes deducted in computing federal taxable income.

#### SUMMARY OF THE PARTIES' POSITIONS

9. Petitioners contend that the testimony by Mr. Greenland establishes that they are entitled to the claimed losses. Alternatively, they assert that the Division of Taxation has failed to establish that the amounts should be disallowed.

10. Petitioners also allege that a refund for the year 1983 has not been paid to them. However, other than testimony by Mr. Greenland, no proof was offered which would indicate that any inquiry was made of the Division of Taxation regarding the issuance of a refund or the tracing of an errant payment.

11. The Division of Taxation claims that because of the failure to produce any documentation, the petitioners have not established entitlement to the claimed losses, that the recomputation is correct in all respects and that until a determination is rendered in this matter, it is impossible to determine if a refund is due petitioners.

### CONCLUSIONS OF LAW

A. For the years in issue, the New York taxable income of a nonresident individual is his New York adjusted gross income less his New York deduction and personal exemptions (Tax Law former § 631[a]). New York adjusted gross income, as that term was used is "federal adjusted gross income, as defined in the laws of the United States for the taxable year, derived from or connected with New York sources," with certain modifications (Tax Law former § 632). Except as specifically modified, New York law recognized the itemized deductions claimed for Federal purposes as well (Tax Law § 615 and former § 635).

B. Generally, the cost of group term life insurance purchased for an employee is included in the gross income of the employee (Internal Revenue Code § 79[a]). While the I.R.C. also provides for the deductibility by individuals of casualty losses (I.R.C. § 165[c][3]), the amount of the deduction is limited to that portion which is "not compensated by insurance or otherwise" (I.R.C. § 165[a]). Further, taxpayers are required to treat theft losses as sustained in the taxable year in which they are discovered (I.R.C. § 165[e]). Finally, one of the modifications reducing Federal itemized deductions is the adding back of that portion which is attributable to state and local income taxes (Tax Law § 615[c][1] and former § 635[c][1]).

C. Petitioner Kenneth Greenland testified that the insurance company appraisal of the damage from his house fire and the reimbursement were approximately equal, to wit, \$3,600 less an unspecified deductible amount. Accepting this testimony as true, the petitioner has not established the loss as claimed of \$5,500.00 resulting from the fire. As set forth above, a casualty loss deduction is limited to that amount which is not "compensated by insurance or otherwise" (I.R.C. § 165[a]). Thus, the amount which could be claimed is only the unreimbursed portion, more commonly referred to as the deductible. Without proof of the amount of the deductible, it is impossible to determine if any amount is properly claimed (Matter of Schneier, Tax Appeals Tribunal, November 9, 1989).

D. The theft loss, if it is properly characterized as such, should have been deducted in toto in the year of its discovery. Without explanation, petitioners deducted part of the alleged loss in 1982 and the remainder in 1983. Although they claimed to have, and were given an opportunity to present, documentary evidence in support of the alleged theft, petitioners offered only unsupported testimony. The absence of independent proof leads to the conclusion that such evidence would not have supported petitioners' claim. Certainly, the amount of the loss can not be determined. Indeed, a question remains whether, even in the most favorable light for petitioners, there was a theft at all. The assertion by petitioners is that they gave money of their own free will to a third party, secured by a note and on the promise of a substantial return on investment, that facts came to light causing petitioners to suspect that individual's character and that they were unable to contact that person in order to recover the money. Such facts might portend a theft. However, the same facts may indicate a bad debt, a business deal gone sour or, perhaps, nothing more than a failure to communicate. In any case, petitioners have not met their burden of establishing that the Division was incorrect in disallowing the deduction, as to either amount or deductibility (Tax Law § 689[e]; 20 NYCRR 3000.10[d][4]). Absent substantiation of the alleged theft and the unrecompensed portion of the fire loss, the Division correctly disallowed those claimed losses.

E. Petitioners do not dispute the inclusion by the Division of amounts paid by an employer

for group term life insurance premiums. While there are specific qualifications and exceptions, an amount equal to the cost of this insurance is generally taxable (IRC § 79). The inclusion of such amounts in determining gross income is, therefore, proper.

F. The remaining adjustment concerns the reduction of itemized deductions for the amount of state and local income taxes. Petitioners do not dispute that this calculation was omitted from their state returns, nor do they take issue with the computation by the Division adding those amounts back to arrive at New York taxable income. Accordingly, that adjustment stands as unchallenged.

G. The Division acknowledges that even with the recomputation of petitioners' 1981 income, there was an overpayment of taxes for that year. According to the Statement of Audit Changes, that overpayment was applied to the deficiencies determined for 1982 and 1983. The Notice of Deficiency reflects the net deficiency for the three year period stated: 1981, 1982 and 1983. Comparing wage and tax statements to the deficiencies computed for the remaining two years also demonstrates overpayments for each such year. There is no indication that the Division is disputing the accuracy of the wage and tax statements. In fact, the Division offered them into evidence. Petitioners claim that although a simple comparison of tax withheld and tax determined due indicates an overpayment for 1983, they have received neither a refund, nor a credit of the excess to this or any other liability. Tax Law § 689(b) allows a petitioner to assert a claim for refund for the same taxable year for which he files a petition for a redetermination of a deficiency. Tax Law § 687(f) provides that the Tax Commission may determine that a taxpayer has made an overpayment for any year upon which it has received a timely petition for a redetermination of a deficiency. In this context, the term "state tax commission" is deemed to refer to the Division of Tax Appeals (Tax Law § 2026). Both in their petition and again at hearing, petitioners made a demand for the 1983 refund they claimed to have not received. Thus, the question of whether there has been an overpayment for the year 1983 is properly before this forum. While not conceding that a refund is due for the 1983 tax year, it is not clear that the Division disputes the point either. In its answer to the petition, the Division avers that it lacked "knowledge or information sufficient to form a belief as to the truth of each and every allegation...." At hearing, counsel for the Division took the position that the disallowance of the claimed losses "negates the refund"(Transcript p.11). Although the Statement of Audit Changes does demonstrate that the 1981 overpayment was netted out against the deficiency for the subsequent years, the same can not be said for the 1983 overpayment. For that year, withholding was \$2,431.68, audited tax due is \$1,118.30, tax previously computed for that year was \$248.23<sup>1</sup> and additional tax due for 1983 was determined to be \$870.07. This latter amount was satisfied, in part, by application of the overpayment for the year 1981, as previously stated. Thus, the withheld amount should be reduced by the tax previously computed in accordance with the 1983 tax return. If has not already been refunded to petitioners, the Division is hereby directed to apply the remainder to the outstanding deficiency and to refund the balance to petitioners.

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<sup>1</sup>Petitioners' 1983 New York Nonresident Income Tax Return indicated total tax due of \$228.63. A computer-generated "exception" document attached to the return indicates that the actual tax due per the return should have been \$248.63. The \$20.00 difference appears to have been a simple arithmetical error which is not disputed by petitioners. The \$248.63 amount was used as the "tax previously computed" figure in arriving at the deficiency for the 1983 tax year.

H. The Notice of Deficiency, dated January 15, 1986, is sustained and except as stated in paragraph G, the petition of Kenneth and Maryann Greenland is in all respects denied.

DATED: Troy, New York  
March 29, 1990

/s/ Kevin A. Cahill  
ADMINISTRATIVE LAW JUDGE